FILED
United States Court of Appeals
Tenth Circuit

February 1, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. GWEN BERGMAN, Defendant - Appellant.	No. 08-1009 (D.C. No. 1:04-CR-00180-WDM)

ORDER

Before **MURPHY**, **O'BRIEN**, and **GORSUCH**, Circuit Judges.

This court lacks jurisdiction over this appeal because the order being appealed is not final or otherwise immediately appealable, and no exception to the final judgment rule is present here.

The defendant filed a *pro se* notice of appeal from a minute order entered by the magistrate judge regarding a motion to be released on bond pending trial. The defendant asserts that she has been detained without first having the benefit of a hearing. (Docket No. 282, NOA at 1, 5.) Although the text of the minute order is not lengthy, the order does not appear to have specifically denied the defendant's oral motion for release on bond. (Docket No. 277, Magistrate Judge's Minute Entry of 12/21/07). Instead, after

noting that the defendant made an oral motion for release and the government orally objected, the order directs counsel to file a written motion on the issue. (*Id.*)

The defendant does not assert that she sought review of the minute order by the district court, and there are no entries on the district court docket indicating any such challenge has been made. Further, there has been no disposition of the superceding criminal counts pending against the defendant, and no final judgment has been entered.

The defendant also cites the denial of a "double jeopardy" claim in the title of the *pro se* notice of appeal. She does not cite any order specifically denying a motion regarding double jeopardy, however. And the magistrate judge's minute order of December 21, 2007, does not discuss any assertion made by the defendant regarding double jeopardy. (Docket No. 277, Minute Entry of 12/21/07.)

As a general matter, this court has jurisdiction to review only final decisions, 28 U.S.C. § 1291, and specific types of interlocutory orders. A final decision is one that disposes of all issues on the merits and leaves nothing for the court to do but execute the judgment. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996). "The exceptions to the final judgment in criminal cases are rare," and there exists an "overriding polic[y] against interlocutory review in criminal cases." *Flanagan v. United States*, 465 U.S. 259, 270 (1984).

One recognized exception to the final judgment rule in criminal cases is an order releasing or detaining a defendant. *Stack v. Boyle*, 342 U.S. 1, 6 (1951); *see also* 19 U.S.C. § 3145(c). The order the defendant appeals here does not fall into this exception,

however. First, this is not a detention order. 18 U.S.C. § 3142(e). Similarly, the defendant was not denied a hearing regarding release on bond. *Cf. United States v. Cisneros*, 328 F.3d 610, 616 (10th Cir. 2003) (stating that judicial officer may detain defendant only after holding a hearing pursuant to § 3142(f)). The magistrate judge's order only directs counsel to file a motion for release on bond. No decision was rendered on the defendant's motion, nor was a decision rendered without a hearing.

Moreover, even if this minute order could be construed as a detention order, orders entered by magistrate judges and not acted upon by the district court are generally not final and appealable. *See Phillips v. Beierwaltes*, 466 F.3d 1217, 1222 (10th Cir. 2006). This principle applies in this context as well. The Bail Reform Act provides that if a magistrate judge orders the defendant detained, then the defendant may file a "motion for revocation or amendment of the order" "with the court having original jurisdiction over the offense," i.e., the district court. 18 U.S.C. § 3145(b); *cf. United States v. Cisneros*, 328 F.3d 610, 615 (10th Cir. 2003) (discussing similar provisions in § 3145(a) for review by district court of magistrate judge's pretrial release order). It further provides that "[a]n appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of sections 1291 of title 28 and section 3731 of this title." 18 U.S.C. § 3145(c). Section 1291, in turn, gives the courts of appeals jurisdiction of appeals "from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Therefore, a detention order entered by a district court would be final and appealable, but a magistrate judge's order is not, because it is

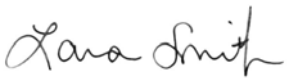
subject to review by the district court. *See United States v. Harrison*, 396 F.3d 1280, 1281 (2d Cir. 2005) (dismissing for lack of jurisdiction appeal from magistrate judge's detention order).

A second recognized exception to the final judgment rule in criminal cases is the denial of a pretrial motion to dismiss an indictment on double jeopardy grounds. *Abney v. United States*, 431 U.S. 651, 659 (1977); *see also United States v. Perez-Herrera*, 86 F.3d 161, 163 (10th Cir. 1996). While the defendant mentions double jeopardy in the title of her notice of appeal, she does not describe any order where the district court considered and denied her motion to dismiss on this ground. Although documents construed as notices of appeal should be construed liberally and "mere technicalities" should not defeat consideration of a case on the merits, *United States v. Morales*, 108 F.3d 1213, 1222 (10th Cir. 1997), the magistrate judge's December 21, 2007 minute order does not mention double jeopardy. (Docket No. 277, Minute Entry of 12/21/07). Besides, even if the magistrate judge considered and decided the issue, it does not appear that the district court has considered the magistrate judge's decision, which prevents review by this court at this time. *See Phillips*, 466 F.3d at 1222.

Finally, we note that the district court docket shows that counsel has not filed a written motion for release on bond consistent with the magistrate judge's instructions.

APPEAL DISMISSED. The mandate shall issue forthwith.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk



by: Lara Smith
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